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ALEXANDER L. STEVAS,
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No. 84-1201

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARSHALL I. TEICHNER,

Petitioner

v.

ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

For the sake of brevity, Respondent will not provide sections in its brief for opinion below, jurisdiction and statute involved. Respondent will address in its argument those portions of those sections of petitioner's brief which respondent considers inaccurate or inadequate.

QUESTIONS PRESENTED

I. WHETHER PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C. §1257 (3).

II. WHETHER PETITIONER HAS RAISED A SUBSTANTIAL FEDERAL QUESTION.

STATEMENT OF THE CASE

For the sake of brevity, Respondent will not recount the underlying facts. An accurate statement of facts material to the consideration of the questions presented is contained in the opinion of the Supreme Court of Illinois and is attached to Petitioner's brief (Petition A-1-35) Respondent will, however, briefly summarize the proceedings below.

On May 28, 1981 the Administrator filed a two count complaint. Count I alleged that Petitioner took an unconscionable and excessive fee. Count II alleged that Petitioner engaged in commingling, conversion and overreaching with regard to his handling of funds entrusted to him as costs advanced.

On May 10, 1982 the hearing was concluded. On January 11, 1983 the hearing board issued its unanimous report finding the misconduct alleged and recommending that Petitioner be disbarred. On March 10, 1983, Petitioner filed exceptions.

On September 20, 1983, after considering briefs and oral argument, the Review Board issued its unanimous report affirming the report of the Hearing Board and recommending disbarment.

On September 20, 1984, after considering briefs and oral arguments, the Supreme Court of Illinois issued an order disbarring Petitioner from the practice of law.

On November 2, 1984 Petitioner filed a Petition for Rehearing with the Supreme Court of Illinois raising a federal question for the first time.(App.p.A-1) On December 7, 1984 the Supreme Court of Illinois denied the petition without ruling on the federal question. (App.p.A-8)

On January 25, 1985 Petitioner served Respondent with copies of his Petition for Writ of Certiorari to the Supreme Court of Illinois.

SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate that this Court has jurisdiction to review the final disciplinary judgment of the Supreme Court of Illinois. Petitioner did not raise any federal constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioner has not asserted or demonstrated that Petitioner fits within an exception to the general rule precluding review of untimely federal claims.

Petitioner has failed to raise any substantial federal constitutional question which makes review by this Court necessary or appropriate. The only issues raised by this petition are issues of fact and state law.

ARGUMENT

I

PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C. §1257(3)

Petitioner is required to demonstrate in his petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois. However, Petitioner has neglected to assert any jurisdictional argument. Petitioner's conspicuous silence bespeaks his lack of any legitimate claim pursuant to 28 U.S.C. §1257(3).

Raising a federal question for the first time in a petition for rehearing after judgment of the highest State Court is generally insufficient to invoke federal jurisdiction unless the Court actually entertained the petition and expressly decided the federal question. Radio Station WOW v. Johnson, 326 U.S. 120,128 (1945); Hanson v. Denckla, 357 U.S.235,243-244 (1958); Herndon v. Georgia, 295 U.S. 441,443 (1935); American Surety Co. v. Baldwin, 287 U.S.156 (1932); Forbes v. State Council, 216 U.S. 396 (1910); Simmerman v. Nebraska, 116 U.S. 54, (1885).

Petitioner seeks review of a federal constitutional question first raised in his petition for rehearing after judgment of the Supreme Court of Illinois. (App. p.A-1) Petitioner's constitutional argument consisted of a mere recital that "disbarment raises grave constitutional questions of deprivation of due process and equal protection." (App. p. A-7). However, the petition does not speculate as to what those grave questions might be. As the Illinois Court denied the petition without entertaining the federal question (App.p.8), the general rule precludes review by this Court.

In order to invoke the jurisdiction of this Court to review the untimely constitutional claim, Petitioner must establish that his case fits within an exception to the general rule precluding review. Consolidated Turnpike Co. v. Norfolk & Ocean View Railroad Co., 228 U.S.326, 334 (1912). The exception only applies to cases where the federal claim could not have been anticipated and therefore the petition for rehearing afforded the first opportunity to raise the question. Missouri Insurance Co. v. Gehner, 291 U.S. 313 at 320 (1929).

This Court has applied the exception in cases in which a state Supreme Court suddenly reversed a long standing precedent, issued an unprecedented construction of State law which effectively denied Petitioner a forum in

which to seek relief, or uniquely construed a State statute which infringed federal rights. Great Northern Railway,; Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S.673 (1930); Missouri Insurance Co., Id.

Petitioner has made no attempt to demonstrate any circumstances similar to cases in which this Court has applied the exception. Petitioner does not claim, and the record does not establish, that the Supreme Court of Illinois supplied a new or unexpected basis for his recently asserted federal claim. Great Northern Railway Co. v. Sunburst Oil and Refining Co., Id.

Petitioner claims that disbarment ordered pursuant to the finding that Petitioner charged an excessive and unconscionable fee and converted client funds is a denial of substantive due process. However, Petitioner does not and cannot claim that disbarment could not have been anticipated. The Administrator, who is charged with prosecuting disciplinary cases, urged the most severe sanction of disbarment at every stage of the three-tiered disciplinary proceeding. At each stage the requested sanction was adopted. (Petition p.A-30) Therefore, Petitioner's failure to raise any federal question regarding the severity of the sanction imposed reflects nothing more than a conscious decision to avoid raising any federal question before the State Court.

Petitioner has failed to demonstrate that this Court has jurisdiction to review the final disciplinary judgment of the Illinois Supreme Court. Petitioner did not raise any federal constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioner has not demonstrated that his claim fits within the exception to the general rule precluding review of untimely federal claims.

II

PETITIONER HAS RAISED NO SUBSTANTIAL FEDERAL QUESTION

Mere allegations that a federal question exists will not confer federal jurisdiction. Rather, there must be a real substantive federal question on which the case turns in order to invoke the jurisdiction of the Supreme Court. See, Equitable Life Assurance Society v. Brown, 187 U.S. 308,311 (1902). The petition will be denied if it appears that the federal question is merely formal, is so absolutely devoid of merit as to be frivolous, or has been explicitly foreclosed by decisions of this Court to leave no room for real controversy. Id.

No genuine federal question has been raised by this petition. The only issue raised by Petitioner is an issue of state law which the Supreme Court of Illinois decided.

Petitioner argues that the Supreme Court of Illinois violated his substantive due process rights by ordering disbarment based upon collection of a 25% contingent fee pursuant to a valid representation contract. (Petition p.10) Petitioner has misread the Illinois Court's opinion. The Court not only found that Petitioner's $7,000 fee was excessive, it also found that Petitioner converted an additional $7,000 from his client, a widow.

The Illinois Court found that Petitioner's collection of $7,000 from a widowed client pursuant to the uncontested distribution of life insurance proceeds was not obtained pursuant to the contingent fee contract. The terms of the contract provided that no fee was due unless recovery occurred pursuant to a "settlement" or "judgment." The Illinois Court logically determined that since there was no dispute collection of the proceeds was not a "settlement" or "judgment." After examining the criteria set forth in the Code of Professional Responsibility, the Court found that Petitioner's fee was excessive and unconscionable and warranted discipline. (Petition pp.A-17 and A-24).

Petitioner argues that he was denied substantive due process because the Illinois Court "ignored" testimony that the additional $7,000 was a retainer

rather than an advance against costs. Rather than ignoring Petitioner's testimony, the Court was expressly mindful of the fact that during the Administrator's investigation, Petitioner unequivocally stated that the funds were an advance against costs but later testified before the Hearing Board that the funds were a retainer. (Petition p. A- 25-26). The Court determined that Petitioner had actually acquired the funds by inducing his recently widowed client to supply him with funds pursuant to a products liability suit which he was already bound to prosecute under a contingent fee contract. (Petition p.A-29) Petitioner failed to maintain the funds in a separate client trust account and therefore converted the widow's funds.

Petitioner's first two arguments inaccurately represent factual findings of the Supreme Court of Illinois. However, even if Petitioner's contentions were true, they would fail to invoke federal jurisdiction which does not permit review of factual determinations by State Courts. The Supreme Court's only "power is to correct wrong judgments, not to revise State Court opinions". Herb v. Pitcairn, 324 U.S.117 at 126 (1945); Zacchini v. Scripps, 433 U.S.562 (1977).

Petitioner's final two arguments are equally without merit. Petitioner claims the Illinois Court improperly characterized Petitioner as a recidivist. (Petition p.16). In 1980 Petitioner was suspended from the practice of law for two years based upon a finding of improper solicitation. In re Teichner, 75 Ill.2d 88 (1979), cert.denied, 444 U.S.917 (1979). The Illinois Court expressly held that Petitioner was "not a recidivist in the ordinary sense" because the conduct which is the subject of this proceeding occurred prior to the imposition of the earlier sanction (Petition p.A-39).

The Court noted however, that the serious nature of the misconduct in both cases would necessitate disbarment if prosecuted in their normal sequence or simultaneously. (Petition A-34). Therefore, mindful of its duty to safeguard the public and maintain the integrity of the legal profession, the Supreme Court of Illinois ordered Petitioner's disbarment.

Petitioner also claims the Supreme Court of Illinois lacks ascertainable standards for disciplinary sanctions and thereby violated Petitioner's due process rights (Petition p.20). The due process provision of the United States Constitution does not require more than the standard employed by the Supreme Court of Illinois. This Court has never

held that attorney discipline must be imposed in a mechanistic fashion so that a violation of a certain disciplinary rule necessarily results in the imposition of the exact same quantity of discipline. Such a mechanistic approach might give an attorney less consideration than the effort of the Illinois Supreme Court to employ flexibility in selecting a consistent sanction after review of all the facts and circumstances.

Petitioner is requesting this Court to review the decision of the Supreme Court of Illinois involving state law. The judgment of the Supreme Court of Illinois imposing discipline upon a lawyer whom it licensed is a matter within its authority. Goldfarb v. Virginia State Bar, 421 U.S.773, 792 (1975). Lawyers have historically been "officers of the court." See, e.g., In re Primus, 436 U.S.412,422 (1978). In Illinois the power to discipline an attorney is inherent in the Supreme Court of Illinos. In re Titelbaum, 13 Ill.2d 486, 150 N.E.2d 873, cert. denied, 358 U.S.881, rehearing denied, 358 U.S.923.

This Court cannot review the judgment of a state court based upon adequate State grounds. Berea College v. Kentucky, 211 U.S. 45 (1908); Fox Film Corp. v. Muller, 296 U.S. 207(1935).

> "The reason for this is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the State and federal judicial systems and in the limitations of our own jurisdiction." Herb v. Pitcairn, Id. at 125; Zacchini v. Scripps-Howard Broadcasting Co., Id.

The Supreme Court of Illinois exercised its long recognized and inherent authority in the discipline of one upon whom it had bestowed the privilege of being considered an officer of the Court. Goldfarb v. Virginia State Bar, Id.; In re Titelbaum, Id. That decision can not be disturbed.

Petitioner requests this Court to substitute its judgment for that of the Supreme Court of Illinois as to determinations of fact and the quantum of discipline imposed. Petitioner has failed to raise any substantial federal constitutional question which makes review by this Court necessary or appropriate. The only issues raised by this petition are issues of fact and state law.

CONCLUSION

WHEREFORE, the Administrator respectfully requests that the Court deny this Petition for Writ of Certiorari.

Respectfully submitted,

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Diane Kristen, law student, assisted in the preparation of this brief.

APPENDIX A1 - A8

No. 59268

IN THE
SUPREME COURT OF ILLINOIS

In Re:)
)
MARSHALL I. TEICHNER,)
)
Attorney-Respondent.)

PETITION FOR REHEARING

Now comes respondent, MARSHALL I. TEICHNER, and respectfully petitions this Honorable Court for rehearing in this cause and, in support thereof, states the following:

Respondent respectfully submits that the sanction of disbarment imposed by this Court is excessive in light of the nature of respondent's conduct and the substantial character evidence introduced at the hearing, and further submits that the sanction is inconsistent with prior decisions of this Court, particularly In re Crane, 96 Ill.2d 40 (1983). Moreover, with respect to the finding of commingling of client's funds, respondent suggests that this Court's opinion disregards the testimony of all three

witnesses to the fee agreement between respondent and the complainant, all of whom stated that the payment of $7,000.00 to respondent by the complainant at the time of the negotiation of the Metropolitan Life Insurance Company insurance benefits represented a non-refundable retainer in connection with the prosecution of a product liability claim.

With respect to the Administrator's allegation that respondent charged the complainant an excessive and unconscionable fee in connection with respondent's efforts to obtain the proceeds of a group life insurance policy, this Court held that, when viewed in light of the circumstances presented to respondent at the time, respondent's decision to enter into a contingent fee contract with the complainant in connection with the group life insurance policy benefits does not subject him to discipline. However, this Court held that, in the absence of any contest to complainant's entitlement to the benefits of the group life insurance policy, respondent's collection of his fees pursuant to the contingent fee agreement warrants disciplinary action.

Respondent respectfully submits, however, that the record in the instant case demonstrates that there was, in fact, a contest to Helen Escobedo's entitlement to the group life insurance policy benefits. Prior to the time that the Metropolitan Life Insurance Company issued its check to Helen

Escobedo for the insurance policy benefits, Juan Escobedo's employer received a competing claim to the insurance proceeds from Heriberta Escobedo, the lawful wife of the decedent. (Resp.Ex.26). For reasons not disclosed in the record, Juan Escobedo's employer failed to advise the Metropolitan Life Insurance Company of the competing claim to the benefits. The record in the instant case established that the Metropolitan Life Insurance Company would have stopped payment on the check to Helen Escobedo if it had been notified of the competing claim (Administrator's Exhibit No. 21).

Regardless of whether respondent was, in fact, entitled to receive the fee charged, respondent reasonably believed that he was entitled to receive the fees charged. Moreover, respondent stood ready to defend the complainant against any subsequently asserted claim for the insurance proceeds by Herierta Escobedo and acknowledged his duty to return the contingent fee he had received if Heriberta Escobedo's claim were successful. Respondent submits that, in view of the entire record, disbarment is too severe a sanction to be imposed upon respondent as a result of his reasonable belief of an entitlement to fees.

With respect to the Administrator's claim that respondent commingled and converted the funds of his client, respondent suggests that this Court's opinion disregards the testimony, not only of the

respondent, but also of the complainant and of her son that the payment of the $7,000.00 to respondent in connection with the prosecution of the product liability case was intended to be a non-refundable retainer in connection with that action. (See February 22, 1982 transcript of proceedings at p.43, April 20, 1982 transcript of proceedings at pp. 106-108, and May 10, 1982 transcript of proceedings at p. 283). Irrespective of the Administrator's potential impeachment of the testimony of the respondent in connection with the retainer question, the record in this case establishes that, regardless of the absence of any notations on or written amendments to the contingent fee agreement in connection with the product liability case, the complainant understood that the payment of the $7,000.00 sum constituted payment of a non-refundable fee, and that she had agreed with respondent to pay that non-refundable fee at the time she executed the contingent fee agreement. Significantly, complainant's testimony on this point was buttressed by the testimony of her son, Robert Mundo

In that regard, respondent's failure to segregate the funds paid by the complainant should not subject him to the sanction of disbarment. Since the client understood that, regardless of whether the entire $7,000.00 was spent to cover the costs of prosecuting the product liability claim, none of the money would be returned to her, and since respondent knew that he could not seek reimbursement

from the complainant for the first $7,000.00 in costs associated with the prosecution of the claim, it was not unreasonable or improper for respondent to treat the $7,000.00 as income and to fail to segregate the funds in a trust account. Stated simply, no portion of the $7,000.00 was ever going to be returned to the client, and all parties to the agreement, including the client and her son, understood that fact at the time respondent was retained to prosecute the action. Respondent respectfully submits that this Court's opinion places an additional burden on attorneys which this Court has never previously articulated, and disbarment is an excessive sanction given respondent's reasonable belief that he had no obligation to place the retainer fee that he received into a trust account on behalf of this client.

Finally, the sanction of disbarment is excessive in this case. This Court, in its opinion, noted "the substantial character evidence presented on behalf of respondent," (Slip.Op.at p.11) as well as the fact that "respondent has repaid the money here involved." (Id.) However, this Court minimizes the significance of complainant's letter to the Disciplinary Commission in which she recanted her original complaint against the respondent. Significantly, the complainant admitted at the hearing of this case that that letter recanting her complaint was true and accurate when written. The fact that respondent requested Helen Escobedo to write the letter does not negate the truth of the statements contained therein.

This Court held that disbarment was an appropriate sanction in this case in light of respondent's prior suspension from the practice of law for a two-year period. Respondent respectfully suggests that the misconduct with which he has been charged with in this case occurred prior to his suspension from the practice of law, that this Court ignored the rehabilitative effects upon respondent of his two-year suspension from the practice of law as established by the character evidence produced at trial concerning respondent's present fitness to practice law and that the misconduct with which respondent has been charged in the instant case is sufficiently removed in time from the misconduct giving rise to the two-year suspension so as to warrant reconsideration of this Court's order of disbarment.

Furthermore, this Court's order of disbarment is excessive in light of In re Crane, 96 Ill.2d 40 (1983). As pointed out in the dissenting opinion in this case, the facts of the instant case demonstrate no more misconduct, if any, than was at issue in Crane, where this Court imposed a sanction of a three-year suspension from the practice of law. Indeed, in Crane, as opposed to the instant case, the respondent was alleged to have advised his client to make statements in court which the attorney knew to be false, a charge not present in the instant case.

Respondent respectfully submits that this Court has imposed an excessive and inappropriately harsh sanction upon respondent by failing to evaluate carefully the facts of the instant case on its own merits, and it has, by considering respondent's prior suspension from the practice of law as an aggravating factor in connection with the quantum of discipline to be imposed in this case, effectively punished respondent twice for that one instance of prior misconduct. This Court's order of disbarment raises grave constitutional questions of deprivation of due process and of equal protection under the law.

In view of the entire record, respondent respectfully prays that this Court rehear this cause and reverse the Report and Recommendation of the Review Board of the Attorney Registration and Disciplinary Commission, or, in the alternative, reconsider a lesser sanction to be imposed upon respondent.

Respectfully submitted,

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59268

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November 30, 1984

Mr. Carl H. Rolewick
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No. 59268 - In re: Marshall I. Teichner.
Disciplinary Commission

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court, Circuit Court or other Agency on December 7, 1984.

(stamped)
FILED
Dec. 3, 1984
Atty Reg & Disc Comm
Chicago